RHB BANK BHD

v.

SSB CONSORTIUM BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-881-2004]
19 JANUARY 2009

BANKRUPTCY: *Practice and procedure - Action against bankrupt - Creditor's application for leave to proceed with action against bankrupt - Whether such application ought to be made in the bankruptcy proceedings - Whether court hearing civil action competent to hear the application for leave - Whether order for leave issued by court hearing civil action irregular*

The plaintiff commenced the present civil action in the Commercial Division of the High Court against the defendants. The second defendant was subsequently declared a bankrupt in Bankruptcy Petition D4-29-54-2005 ('the bankruptcy matter'). The plaintiff thus filed encl. 38 in the present civil action for leave to proceed with the action against the second defendant, pursuant to s. 8(1) of the Bankruptcy Act 1967. The High Court granted the leave sought. Subsequently, the High Court Judge had doubts as to the correctness of his order granting the plaintiff leave. The learned judge thus directed the parties to attend and submit on a review of his decision granting leave to the plaintiff. The issue was whether the plaintiff's application in encl. 38 should have been made in the bankruptcy matter and before the appropriate court hearing the matter.

Held (Ordering encl. 38 to be struck out with liberty to the plaintiff to file it afresh in the bankruptcy matter):

(1) When the High Court Judge heard encl. 38, he was not sitting as a judge of a bankruptcy court exercising jurisdiction in bankruptcy. At that material time, the relevant bankruptcy file containing the cause papers was not before the judge. There was also no transfer order transferring the bankruptcy matter to the learned judge. *BBMB Securities Sdn Bhd v. Tan Lay Hiong & Yang Lain* (not foll). (para 22)

A **(2)** Since the learned judge was not sitting as a judge of a bankruptcy court when he considered encl. 38, the proceeding was highly irregular and his order was thus a nullity and had to be set aside. (para 22)

B **Case(s) referred to:**
BBMB Securities Sdn Bhd lwn. Tan Lay Hiong & Yang Lain [2002] 7 CLJ 1 HC ***(not foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 8(1), 88
C Companies Act 1965, s. 176(10)
Courts of Judicature Act 1964, s. 20

For the plaintiff - Nitin Nadkarni; M/s Lee Hishamudin, Allen & Gledhill
For the 1st & 2nd defendants - Asrul Nizam; Director General of Insolvency
For the 3rd defendant - KH Chong; M/s Lee & Chong

D *Reported by Andrew Christopher Simon*

JUDGMENT

E

Hishamudin Mohd Yunus J:

[1] In the present case I had directed the deputy registrar to write a letter (encl. 45) to all parties to appear before me to
F submit their views for my consideration on my proposal to review the legality of my decision given on 14 April 2008 in respect of encl. 38.

[2] Enclosure 38 is the plaintiff's application for leave of this court to proceed with the present civil action against the second
G defendant pursuant to s. 8(1) of the Bankruptcy Act 1967 in the light of the fact that a receiving and adjudication order had been made by the Bankruptcy Court, that is Commercial Division Court No. 4 *via* bankruptcy case, namely, In Bankruptcy Petition No. D4-29-54-2005 on 12 July 2006 against the second defendant.
H The summons in chambers application (encl. 38) was heard before me on 14 April 2008. On that day the counsel for the plaintiff was present; so was counsel for the third defendant. But counsel for the Director General of Insolvency, representing the first and second defendants was absent.

I

[3] Before the application (encl. 38) was filed on 8 May 2007, the plaintiff had, earlier, on 29 July 2005 obtained a partial summary judgment against all the three defendants. A

[4] On 2 August 2005 the plaintiff, dissatisfied with the partial summary judgment, filed a notice of appeal to the judge in chambers against the decision of the learned senior assistant registrar who had refused to grant summary judgment on that part of the plaintiff's claim pertaining to bankers' acceptance. B

[5] The defendants on their part filed a cross appeal to the judge in chambers on 8 August 2005 against the partial summary judgment that had been entered against them. C

[6] Before the appeal and the cross-appeal could be heard, the following happened in relation to the first and second defendants. D

[7] Firstly, on 20 September 2005 the first defendant obtained a restraining order pursuant to s. 176(10) of the Companies Act 1965 in the Commercial Division Court No. 4 *via* Origination Summons No. D4-24-335-2005. E

[8] Then, on 29 March 2006 the first defendant was wound up in the Commercial Division Court No. 8 *via* Winding-up Petition No. D8-28-553-2005; upon the petition of a financial institution, Southern Bank Berhad.

[9] On 12 July 2006, as already mentioned earlier, a receiving and adjudication order was made against the second defendant by the Commercial Division Court No. 4. F

[10] Section 8(1) of the Bankruptcy Act reads: G

> **8. Effect of receiving order**
>
> (1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose. H I

[11] On 14 April 2008, when encl. 38 came up before me for hearing, only the counsel for the plaintiff and the counsel for the third defendant were present. The counsel for the Director General of Insolvency was absent. There being no objection to the application, and having considered the merits of the application, I granted the leave sought for by the plaintiff.

[12] Subsequently, however, upon reflection, I had a serious doubt as to the correctness, legally, of my decision. For I realized that the plaintiff's application, since it was made pursuant to s. 8 of the Bankruptcy Act, and thus an application on a bankruptcy matter, was made in the present civil suit file. The question that came to my mind is this: should not the application be made in the bankruptcy file, namely, file in Bankruptcy Petition No. D4-29-54-2005; and should not it be made in the appropriate Bankruptcy Court, namely, the Commercial Division Court No. 4? Hence, as I have stated at the beginning of this judgment, I directed the deputy registrar to issue the letter at encl. 45 dated 11 December 2008 for a review hearing to be held on 5 January 2009. On 5 January 2009, however, the review was only partly heard as the counsel present needed more time to research on the issue. Accordingly, further hearing was adjourned to 15 January 2009.

[13] On 15 January, after hearing submissions, in exercising my powers of review I set aside my previous order of 14 April 2008. I did so on the grounds that although I issued the order as a judge of the Commercial Division, nonetheless, when I issued the order, I was not exercising my jurisdiction in bankruptcy, since file in Bankruptcy Petition No. D4-29-54-2005 was then not before me, nor had the bankruptcy case been duly transferred to my court by an appropriate order of the proper Bankruptcy Court, namely, the Commercial Division Court No. 4.

[14] I also ordered encl. 38 to be struck out but with liberty given to the plaintiff to file afresh the same application in file in Bankruptcy Petition No. D4-29-54-2005 in the Commercial Division Court No. 4.

[15] The learned counsel for the plaintiff, Encik Nitin Nadkarni, nevertheless, submits that my order of 14 April 2008 was legally correct as my Court (Commercial Division No. 1) being a Commercial Division Court has, by virtue of Practice Direction

No. 7 of 1987 and Practice Direction No. 1 of 2008, been assigned by the Chief Judge of Malaya pursuant to s. 20 of the Courts of Judicature Act 1964 to hear cases pertaining to bankruptcy matters. Learned counsel submits that it is immaterial that encl. 38 was filed in the present civil suit file instead of in the appropriate bankruptcy action file, namely, file in Bankruptcy Petition No. D4-29-54-2005.

[16] Section 20 of the Courts of Judicature reads:

> **20. Distribution of business**
>
> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

[17] Encik Nadkarni cites on *BBMB Securities Sdn Bhd lwn. Tan Lay Hiong & Yang Lain* [2002] 7 CLJ 1. In this case the 11th defendant was adjudged a bankrupt by the High Court of Kota Kinabalu, Sabah. However, the application for leave pursuant to s. 8 of the Bankruptcy Act was made by the plaintiff in the civil action in the civil suit file D1-22-4634-1998 in the High Court of Kuala Lumpur Commercial Division Court No. 1. At the hearing of the leave application, an objection was raised by the 11th defendant as to the application on the grounds that the application should have been made in the High Court of Kota Kinabalu since the receiving and adjudication order was made by that Court. It was contended that the High Court of Kota Kinabalu was the proper forum being the Court having jurisdiction in the bankruptcy matter.

[18] This objection was overruled by Mohd Ghazali Yusoff J (as he then was). The learned judge held that he had the jurisdiction to hear the application. The learned judge based his decision on the definition of 'the court' in s. 2 of the Bankruptcy Act and on s. 88 of the same Act. Mohd Ghazali Yusoff J in his judgment said (at p. 25):

> Saya telah membenarkan permohonan plaintif untuk perintah bahawa kebenaran mahkamah diberikan kepada mereka untuk meneruskan perbicaraan tindakan ini terhadap defendan ke-11 mendasarkan alasan-alasan yang berikut. Saya berpendapat bantahan tatacara yang ditimbulkan oleh defendan ke-11, iaitu,

bahawa menurut Akta itu forum wajar yang sepatutnya mendengar permohonan ini adalah mahkamah yang mempunyai bidangkuasa dalam kebankrapan, iaitu, Mahkamah Tinggi, Kota Kinabalu, tidak mempunyai apa-apa merit. Pada bacaan saya, mahkamah ini, iaitu, Mahkamah Tinggi Malaya, Kuala Lumpur merupakan forum yang tepat dan sesuai untuk mendengar permohonan ini untuk kebenaran tersebut berdasarkan mahkamah ini ada bidangkuasa di bawah peruntukan-peruntukan Akta itu berkenaan bidangkuasa kebankrapan secara am dan bukan dalam kebankrapan itu. Seksyen 8(1) Akta itu memperuntukkan apabila satu perintah penerimaan dibuat, seorang pemiutang, antara lain, tidak boleh meneruskan sesuatu tindakan atau prosiding undang-undang kecuali dengan kebenaran mahkamah dan atas terma-terma seperti dikenakan oleh mahkamah. Seksyen 2 Akta itu memperuntukkan perkataan "mahkamah" ertinya mahkamah yang mempunyai bidangkuasa dalam kebankrapan di bawah Akta itu, iaitu, "the court" ertinya "the court having jurisdiction in bankruptcy under this Act". Seksyen 88 Akta itu memperuntukkan Mahkamah Tinggi adalah mahkamah yang mempunyai bidangkuasa dalam kebankrapan di bawah Akta itu; seksyen itu berbunyi "The High Court shall be the court having jurisdiction in bankruptcy under this Act". Pada saya adalah jelas takrifan "mahkamah" yang mempunyai bidangkuasa dalam kebankrapan di bawah Akta itu adalah "Mahkamah Tinggi". Seksyen 88 Akta itu tidak mentakrifkan atau memperuntukkan "Mahkamah Tinggi" adalah mahkamah dalam mana petisyen kebankrapan itu difailkan atau merujuknya sebagai Mahkamah Tinggi yang mempunyai bidangkuasa tempatan. Oleh itu saya berpendapat Mahkamah Tinggi, Kuala Lumpur mempunyai bidangkuasa untuk mendengar permohonan ini untuk kebenaran di bawah s. 8 Akta itu.

[19] Section 2 of the Bankruptcy Act defines 'the court' as:

'the court' means the court having jurisdiction in bankruptcy under this Act;

[20] Section 88 of the Bankruptcy Act reads:

88. High Court to be the court having jurisdiction in bankruptcy

The High Court shall be the court having jurisdiction in bankruptcy under this Act.

[21] Encik Asrul Nizam for the Director General of Insolvency (representing the first and second defendants) and Encik K.H. Chong (for the third defendant) were in agreement with the view as expressed by Encik Nadkarni.

[22] To my mind, the pertinent question that needs to be asked is this: on 14 April 2008, when I heard encl. 38, was I sitting as a judge of a bankruptcy court, exercising jurisdiction in bankruptcy, when one considers the fact that the application before me then was filed in the present civil suit file instead of in the bankruptcy action file, namely, file in Bankruptcy Petition No. D4-29-54-2005? In my judgment the answer must be in the negative. For, on 14 April 2008, when considering encl. 38, I could not be said to have been exercising jurisdiction in bankruptcy as the bankruptcy file containing all the cause papers pertaining to the petition that led to the first defendant's bankruptcy was not before me. What was before me on that day was only the present case file. Moreover, the particular bankruptcy case, namely, In Bankruptcy Petition No. D4-29-54-2005 is a case that has been assigned to Commercial Division Court No. 4. My court (Commercial Division Court No. 1) cannot legally hear the matter without there being a proper transfer order by the Commercial Division Court No. 4 transferring the matter to my court; and, needless to say, there was never such an order. Since I was not on 14 April 2008, when considering encl. 38, sitting as a judge of a bankruptcy court, exercising jurisdiction in bankruptcy, the proceeding (ie, the hearing of encl. 38) was highly irregular and my order was, therefore, a nullity, and must be set aside.

[23] With respect, I am unable to agree with view as expressed by Mohd Ghazali Yusoff J in *BBMB Securities Sdn Bhd.*

[Decision in respect of encl. 38 set aside; and encl. 38 to be struck out with liberty given to the plaintiff to file afresh the same application in file in Bankruptcy Petition No. D4-29-54-2005 in the Commercial Division No. 4 court.]